

The Civil-Criminal Distinction in Ohio's Drug Forfeiture Laws

I. INTRODUCTION

Defendants often learn that much of their fate in court proceedings turns on whether a statute used in their prosecution is civil or criminal. Generally, the rights and protections afforded a criminal defendant are greater than those afforded a civil defendant. The differences between civil and criminal proceedings extend from constitutional guarantees to varying degrees of burden of proof required at trial.¹ The primary distinction between civil and criminal statutes is that criminal statutes are punitive in nature whereas civil statutes are remedial in nature.² In this regard, forfeiture statutes present a particularly difficult problem in determining whether a statute is civil or criminal. Generally speaking, forfeiture statutes are considered to be *in rem*.³ Arguably, *in rem* proceedings are aimed "at the property," and as such should be considered remedial or civil in nature. However, by targeting a defendant's property and thereby stripping him of ownership, the overriding result of a forfeiture proceeding might also be considered punitive, and thereby criminally natured. The question is not easy, as evidenced by the evolution of legal theory concerning civil and criminal sanctions.

As with many areas of the law, views concerning civil and criminal law have varied and changed throughout history. Civil and criminal laws were once considered to occupy opposite ends of the spectrum in the legal arena. This early view is evidenced by the words of Lord Mansfield when in 1776 he stated that "there is no distinction better known, than the distinction between civil and criminal laws or between criminal prosecutions and civil actions."⁴ As time progresses, however, so does the law. As such, time has allowed the civil-criminal distinction to draw closer as it has overlapped, entangled, and merged, particularly in forfeiture law; sometimes creating confusion in determining whether a proceeding is criminal or civil in nature.

¹ See *infra* notes 48–63 and accompanying text.

² *State v. Casalicchio*, 569 N.E.2d 916, 923 (Ohio 1991) (Resnick, J., dissenting) (citing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984)).

³ Black's Law Dictionary defines "*in rem*" as "a technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*." BLACK'S LAW DICTIONARY 793 (6th ed. 1990).

⁴ *Atcheson v. Everitt*, 98 Eng. Rep. 1142, 1147 (K.B. 1775).

Although civil sanctions may be used as alternatives to criminal prosecutions,⁵ they need not be limited as such. As one commentator noted, there is an important distinction between civil sanction laws that are meant as alternatives to criminal proceedings, and those intended to "supplement the risks and punishments of criminal proceedings."⁶ The latter type displays a middle ground between civil and criminal proceedings that is often exemplified by drug forfeiture laws. The use of forfeiture laws in seizing the tools of a drug dealer's business is not intended to impede or deter the criminal prosecution of defendants, but rather is intended to aid in the common goal of fighting the war on drugs.

As this Note will argue, it is important to determine whether a statute is civil or criminal. Many potential rights of a would-be criminal defendant hang in the balance of the determination.⁷ Although at first blush a statute might appear to be civil in nature, a closer look may prove otherwise. Whether a statute is civil or criminal in nature has become increasingly important for property owners in the past few years as the federal government has escalated the use of its drug forfeiture laws.⁸ As a result of this increased use in drug cases, defendants are learning firsthand about the implications of their rights in criminal and civil proceedings.⁹

Ohio recently dealt with the issue of whether its drug forfeiture statute is criminal or civil in *State v. Casalicchio*.¹⁰ In *Casalicchio*, the Ohio Supreme Court veered away from the rule of many states¹¹ to hold that forfeiture of

⁵ Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction*, 42 HASTINGS L.J. 1325, 1333 (1991).

⁶ Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 YALE L.J. 1901, 1904 (1992).

⁷ The determination affects the defendant from the beginning of a case to its very end. For example, a criminal defendant must be given Miranda warnings during arrest, which is often long before trial. On the other end of the scale, the burden of proof for criminal trials is usually higher than for civil trials. For a more detailed discussion, see *supra* notes 48-63 and accompanying text.

⁸ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (1970) (codified as amended at 21 U.S.C. § 881 (1988 & Supp. I 1989)).

⁹ See, e.g., Dennis Cauchon, *Are Seizures Legalized Theft? Government Doesn't Have to Prove Guilt*, USA TODAY, May 18, 1992, at A1; see also Gary Fields, *'Robbery With a Badge' in the Nation's Capital*, USA TODAY, May 18, 1992, at A6.

¹⁰ 569 N.E.2d 916 (Ohio 1991).

¹¹ States interpreting their own drug forfeiture laws as being civil in nature include California, Idaho, Illinois, Nevada, Oregon, and Washington. See *infra* note 34.

property pursuant to Ohio's drug forfeiture laws¹² constitutes a *criminal* rather than *civil* proceeding.¹³

This Note seeks to explore and discuss the tests set forth in *Casalicchio* for making such a determination, illustrating the arguments and effects employed in the different tests. In doing so, Part II of the Note looks at the history of forfeiture law. Part III discusses constitutional and other implications of determining whether a statute is civil or criminal. Part IV looks briefly at *Casalicchio* and the tests employed therein. Part V then discusses the possible tests one might apply in making the civil-criminal determination. Part VI applies the tests adopted by both the majority and dissent in *Casalicchio* to the Ohio drug forfeiture statute. Finally, Part VII argues that neither test adopted in *Casalicchio* is appropriate and offers an alternative test to use in making the determination of whether a statute is civil or criminal.

II. HISTORY

A. Early Forms of Forfeiture

Early forms of forfeiture can be traced back as far as the Old Testament and the Ancient Greeks.¹⁴ These people forfeited as deodand¹⁵ to the Crown items that caused the injury or death of another regardless of any fault or wrongdoing by the owner.¹⁶ Common law in England had a similar rule, requiring any chattel causing one's death to be forfeited to the King.¹⁷ Early views justified this result through religious beliefs. Specifically, "the

¹² OHIO REV. CODE ANN. §§ 2933.41-43 (Anderson 1993).

¹³ Justice Resnick, in dissent, disagreed with the majority that Ohio Revised Code Section 2933.43 entails a criminal sanction. Applying a different test than the majority, Justice Resnick determined the statute to be civil in nature. *Casalicchio*, 569 N.E.2d at 922-26.

¹⁴ Walter J. Van Eck, *The New Oregon Civil Forfeiture Law*, 26 WILLAMETTE L. REV. 449, 451 n.15 (1990) (quoting *Exodus* 21:28, "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit" and Æschines the Greek (389-314 B.C.), "we banish beyond our boarders sticks and stones . . . if they chance to kill a man . . .") (citation omitted).

For a recent discussion of early forms of forfeiture, see *Austin v. United States*, 113 S. Ct. 2801 (1993).

¹⁵ "Deodand derives from the Latin *Deo dondum*, 'to be given to God.'" *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974).

¹⁶ Michael Schecter, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1153 (1990).

¹⁷ *Calero-Toledo*, 416 U.S. at 681.

instrument of death was accused," and, as such, required religious expiation.¹⁸ Later views, however, justified the result by arguing that forfeiture was a penalty for carelessness.¹⁹

Another form of forfeiture arose at common law in England for convictions of felonies and treason.²⁰ This forfeiture was considered criminal and was rationalized by the belief that such acts were breaches of the King's peace, a proper penalty being the loss of one's personal property.²¹

B. *History of Modern Forfeiture Law*

There are multiple theories concerning the beginnings of modern forfeiture laws. Oliver W. Holmes argued in *The Common Law* that these laws derive from the deodand of common law.²² Holmes concluded that deodand liability was assigned to an object causing death or injury because of the object's "motion."²³ He analogized this motion to that of ships moving through water to conclude that admiralty forfeiture derived from deodand.²⁴ Some courts have readily adopted this theory²⁵ while others have not.

Another theory of the development of modern forfeiture law rejects Holmes's notion and argues that modern forfeiture law originated independently of deodands during England's maritime expansion.²⁶ This theory explains that admiralty wanted to expand its jurisdiction to gain more clients. In order to do so, the admiralty courts had to "curry the business of the merchant

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 682.

²¹ *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *229).

²² Schechter, *supra* note 16, at 1153 (citing to OLIVER W. HOLMES, JR., *THE COMMON LAW* 25-30 (1923)). For a discussion of the common law see *supra* notes 14-21 and accompanying text.

²³ *Id.*

²⁴ In Holmes's words, "The most striking example . . . is a ship. [T]he old books say that, if a man falls from a ship and is drowned, the *motion* of the ship must be taken to cause the death, and the ship is forfeited" OLIVER W. HOLMES, JR., *THE COMMON LAW* 26 (1923) (emphasis added).

²⁵ See Schechter, *supra* note 16, at 1153 n.18.

²⁶ *Id.* at 1154. The author points out that forfeitures and deodands share certain characteristics including their both being (1) the exclusive prerogative of the state, (2) in rem actions, and (3) imposed regardless of the owner's state of mind. *Id.* at 1153 n.20 (citing Jacob Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 251 (1973)).

class," which favored the in rem proceeding.²⁷ The result was that admiralty laws developed in rem proceedings in which one could lose his ship for failing to pay customs duties.²⁸ Although the Continental Congress complained of Great Britain's use of such laws, the United States found itself implementing similar rules in the first session of Congress.²⁹ Thus, this theory argues that modern forfeiture laws are descendants of early customs laws.³⁰

C. Drug Forfeiture Laws

Considering the size of the drug problem in the United States, it is hard to believe the federal government did not enact its drug forfeiture act until 1970 when Congress passed the Comprehensive Drug Abuse and Control Act.³¹ As amended, this statute helps the government lead the war on drugs in America. It generally provides law enforcement officials the power of forfeiture over monies, manufacturing materials, transportation vehicles, and property involved with the illegal use of controlled substances.³² Interpretation of the statute was broadened in 1988 when the federal executive branch implemented its "zero tolerance" policy aimed not only at stopping the supply of drugs, but also at halting the demand for them.³³ Following the lead of the federal government, many states, Ohio included, began enacting their own drug forfeiture laws.³⁴ The Ohio statute, codified at Ohio Revised Code Sections 2933.42 and 2933.43,³⁵ was recently interpreted by the Ohio Supreme Court in *State v. Casalicchio*.³⁶

²⁷ *Id.* at 1154.

²⁸ *Id.*

²⁹ *Id.* at 1154-55.

³⁰ *Id.* at 1155.

³¹ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (1970) (codified as amended at 21 U.S.C. § 881 (1988 & Supp. I 1989)).

³² *Id.*

³³ Schechter, *supra* note 16, at 1152.

³⁴ Van Eck, *supra* note 14, at 457 n.55 (citing California, Idaho, Nevada, and Washington as states with drug forfeiture laws and discussing the Oregon drug forfeiture laws); see also T.J. Hiles, *Civil Forfeiture of Property for Drug Offenders Under Illinois and Federal Statute: Zero Tolerance, Zero Exceptions*, 25 J. MARSHALL L. REV. 389 (1992) (discussing the Illinois drug forfeiture law).

³⁵ OHIO REV. CODE ANN. §§ 2933.42, 2933.43 (Anderson 1993).

³⁶ 569 N.E.2d 916 (Ohio 1991).

III. *STATE V. CASALICCHIO*

On August 25, 1987, Joseph Casalicchio was driving at a high rate of speed near Cleveland, Ohio, where he was stopped by a police officer who conducted a routine inventory search of Casalicchio's car.³⁷ The search revealed that Casalicchio was in possession of drugs and related drug paraphernalia in violation of Ohio law.³⁸ These items included marijuana cigarettes, hashish, cocaine, and a cocaine inhaler.³⁹ Casalicchio pleaded no contest to two felony offenses and was sentenced for these crimes.⁴⁰

The problem at hand—determining the nature of drug forfeiture statutes—began three days after Casalicchio's sentencing when the State petitioned for forfeiture of the 1974 Chevrolet that Casalicchio was driving when he was arrested on August 25th. A hearing for the petition was held and an order of forfeiture was handed down in early April of 1988.⁴¹ Casalicchio appealed the forfeiture order and the court of appeals reversed the trial court.⁴² The case was ultimately decided by the Ohio Supreme Court, which held that the motor vehicle was contraband as determined by statute and as such was subject to forfeiture pursuant to Ohio Revised Code Section 2933.43(C).⁴³ The court, however, explained in some detail that while it believed the automobile was subject to forfeiture, that forfeiture of Casalicchio's automobile "pursuant to [Ohio Revised Code Section] 2933.43 constitutes a separate *criminal* penalty in addition to the penalty [he faced] for conviction of the underlying felony."⁴⁴ As such, the Double Jeopardy Clauses of both the Ohio and United States Constitutions barred "the state from seeking a new penalty to a crime after a defendant has been sentenced for that crime."⁴⁵ Although agreeing on other

³⁷ *State v. Casalicchio*, 569 N.E.2d 916, 917 (Ohio 1991).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (quoting from the record, "Casalicchio pleaded no contest to possession of a controlled substance, cocaine, in violation of [Ohio Revised Code Section] 2925.11 and possession of a criminal tool, the inhaler, in violation of [Ohio Revised Code Section] 2933.24.").

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 918. The statute provides in pertinent part: "Upon the seizure of contraband pursuant to division (A) of this section, the prosecution attorney . . . shall file a petition for the forfeiture, to the seizing law enforcement agency, of the seized contraband." *Id.* at 925 (citing OHIO REV. CODE ANN. § 2933.43(C)). Section 2933.43(C) of the Ohio Revised Code has subsequently been amended, although not substantively.

⁴⁴ *Casalicchio*, 569 N.E.2d at 921 (emphasis added).

⁴⁵ *Id.*

grounds as to the ultimate result of the case,⁴⁶ Justice Resnick filed an aggressive dissent to the majority's finding that Ohio Revised Code Section 2933.43 constituted a criminal action. Rather, Justice Resnick argued that the statute involves a civil action.⁴⁷

IV. RAMIFICATIONS OF A CIVIL-CRIMINAL DETERMINATION

As previously noted, whether a sanction is civil or criminal can significantly affect a defendant's rights, beginning from the outset of a case and carrying through its end.⁴⁸ The *Casalicchio* case brings to light some of the ramifications of the civil-criminal distinction. In determining that the Ohio drug forfeiture provision involves a criminal sanction, the *Casalicchio* court effectively precluded the government from seizing *Casalicchio's* car.⁴⁹ Generally, the government may seek civil forfeiture before, during, or after a criminal prosecution, but the same is not true of criminal forfeitures. In *Casalicchio*, the government sought to enforce a criminal forfeiture action after a separate criminal prosecution for the same crime had already taken place.⁵⁰ As such, the court's finding that the Ohio drug forfeiture law was criminal caused the prosecutors to violate the Double Jeopardy provisions of both the United States and Ohio Constitutions.⁵¹ This is but one consequence of the civil-criminal distinction.

The Eighth Amendment of the United States Constitution is also implicated. If a court finds a statute to be criminal, the defendant will enjoy heightened Eighth Amendment rights that prohibit "cruel and unusual punishment" and "excessive fines."⁵² Although this amendment does not by its

⁴⁶ The ultimate result of the case was that *Casalicchio's* car could not be forfeited. *Id.* at 922.

⁴⁷ *Id.* at 922-25. The majority-dissent disagreement originates in the use of two different tests to determine the nature of the Ohio statute. The majority relied on a test that is less deferential to legislative intent than the test relied on by Justice Resnick's dissent. *Id.* at 920-21, 923-24; see *supra* note 13; see also *infra* notes 79-96 and accompanying text.

⁴⁸ See *supra* note 7.

⁴⁹ *Casalicchio*, 569 N.E.2d at 916-21. Some commentators believe that, although it is important to distinguish between civil and criminal cases, consequences of the distinction are limited. Cheh, *supra* note 5, at 1369. Cheh argues that in certain areas of civil and criminal cases, constitutional rights traditionally afforded a criminal defendant have begun to or should be applied in civil proceedings as well. *Id.* at 1369-89.

⁵⁰ *Casalicchio*, 569 N.E.2d at 917.

⁵¹ *Id.* at 921. The amendments protect a defendant from bearing multiple criminal penalties for the same crime. U.S. CONST. amend. V; OHIO CONST. art. I, § 10.

⁵² U.S. CONST. amend. VIII.

terms limit itself to criminal cases, the United States Supreme Court has predominately applied it as such.⁵³

The privilege against self-incrimination provided for in the Fifth Amendment of the United States Constitution is also affected by the *Casalicchio* court's determination.⁵⁴ The terms of the Fifth Amendment appear to limit its protection to criminal cases.⁵⁵ However, the Supreme Court has interpreted the amendment to allow its use in proceedings if a witness's testimony "will lead to or provide evidence that could be used in a subsequent criminal case."⁵⁶ This has important effects as its use in a civil proceeding is limited to those cases in which the evidence actually tends to incriminate the witness. On the other hand, there is no question that the Fifth Amendment's protection is afforded a criminal defendant. Moreover, the party invoking the privilege in a civil suit may later be barred from using the omitted evidence on his own behalf.⁵⁷

Still another constitutional privilege affected by the civil-criminal determination is a defendant's Sixth Amendment right to appointed counsel in criminal proceedings.⁵⁸ The Supreme Court has refused to extend this privilege beyond a criminal context.⁵⁹ If a defendant in a civil forfeiture case is to be

⁵³ Cheh, *supra* note 5, at 1381. At the time, Cheh noted that the Supreme Court had hinted to the possibility of its applying the Excessive Fines Clause to civil proceedings. *Id.* (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)). Hindsight has proven Cheh's notion correct as the Court recently determined that application of the Excessive Fines Clause is not limited to criminal cases. *See Austin v. United States*, 113 S. Ct. 2801 (1993) (refusing, however, to determine whether the Clause in fact was violated in that case and refusing to explain circumstances under which the Clause might generally be violated in civil proceedings).

⁵⁴ U.S. CONST. amend. V. The Supreme Court, in *United States v. Ward*, 448 U.S. 242 (1980), held this privilege did not apply to civil forfeiture. Cheh, *supra* note 5, at 1386.

⁵⁵ The Fifth Amendment states that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V; *see also Austin v. United States*, 113 S. Ct. 2801, 2804 (1993) (discussing the Fifth Amendment in conjunction with statement that "[s]ome provisions of the Bill of Rights are expressly limited to criminal cases").

⁵⁶ Cheh, *supra* note 5, at 1384-85 (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)).

⁵⁷ *Id.* at 1385 (citing *SEC v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-50 (S.D.N.Y. 1985)).

⁵⁸ U.S. CONST. amend. VI.

⁵⁹ Jay A. Rosenberg, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 401 (citing *Scott v. Illinois*, 440 U.S. 367 (1979)); *see also Austin v. United States*, 113 S. Ct. 2801, 2804 (1993) (discussing the Sixth Amendment in conjunction with statement that "[s]ome provisions of the Bill of Rights are expressly limited to criminal cases").

accorded such a right, that right will need to be channeled to him via due process grounds.⁶⁰ However, there is a presumption against using the Sixth Amendment right to counsel in a civil context, and overcoming this presumption is no easy task.⁶¹ A criminal defendant need not have this concern as his right to counsel is guaranteed by the amendment.

The privileges just mentioned are only a few of those affected by the *Casalicchio* court's determination that forfeiture of property pursuant to Ohio Revised Code Section 2933.43 entails a *criminal* sanction. Other privileges include the Fourth Amendment's concern for privacy and arbitrary intrusions, the appropriate burdens of proof, and rights afforded by grand jury indictment.⁶² Moreover, state constitutional issues are also affected.⁶³ Considering the many ramifications caused by the civil-criminal distinction, it is clear that the *Casalicchio* decision is critical to a defendant's rights under the Ohio drug forfeiture provision. As a result, determining a proper test to apply in making the distinction should be closely scrutinized.

V. POSSIBLE TESTS TO APPLY IN THE CIVIL-CRIMINAL DETERMINATION

The evolution of decisions in this area has brought a basic format to the process of determining whether a statute is civil or criminal. Two primary tests are employed, each using the same basic format on a two-step basis. Step one involves determining Congressional intent to enact a civil or criminal statute. Step two entails possibly overriding the intent articulated by the legislature.

A. Test One: *Kennedy v. Mendoza-Martinez*

As early as 1886, in *Boyd v. United States*,⁶⁴ the United States Supreme Court stated that Congress may not, by the mere labeling of a statute as civil, preclude a court from determining the true nature of the proceeding.⁶⁵ This being true, the Court later made a ruling seemingly inconsistent with *Boyd* in *Helvering v. Mitchell*⁶⁶ in which it argued that the determination of whether a

⁶⁰ See Rosenberg, *supra* note 59, at 401.

⁶¹ *Id.* at 401-02, 403-06 (citing *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 25-27 (1981)).

⁶² See Cheh, *supra* note 5, at 1349, 1369.

⁶³ The Double Jeopardy Clause of the Ohio Constitution affords one example. OHIO CONST. art. I, § 10; see *State v. Casalicchio*, 569 N.E.2d 916, 921 (Ohio 1991).

⁶⁴ 116 U.S. 616 (1886).

⁶⁵ *Id.* at 633-35. The Court found that although the government sought to impose civil forfeitures, the proceeding was essentially criminal for constitutional protections. *Id.*

⁶⁶ 303 U.S. 391 (1938).

statute is civil or criminal rests upon Congress' intent to create a civil or criminal penalty.⁶⁷ As one commentator noted, *Helvering* showed an immense amount of deference by the Court to Congress. Unfortunately for Congress, however, it never fully examined the bounds of *Helvering* before the test was altered.⁶⁸

Kennedy v. Mendoza-Martinez,⁶⁹ which the majority in *State v. Casalicchio* relies on, added a second step to the process.⁷⁰ The unchanged first step still required a determination of whether Congress intended to enact a civil or criminal statute.⁷¹ The additional second step is applied only if the first step brings the court to the determination that the legislature intended to enact a civil statute. Assuming such an intention is found, a court should then consider seven nonexhaustive factors in determining whether the Constitution requires the statute to be considered criminal, thereby overriding Congressional intent.⁷² These factors include:

[F]irst, whether the statute creates an affirmative disability or restraint; second, whether the underlying behavior has been historically punished as a crime; third, whether the statute requires scienter; fourth, whether the statute promotes retribution and/or deterrence; fifth, whether the underlying behavior is currently a crime; sixth, whether there is an alternative, non-penal purpose behind the law; and seventh, whether the law is well-tailored to its non-penal purpose.⁷³

The *Kennedy* court, however, never substantively reached the seven point layout as it determined that Congress intended the statute then under interpretation to be criminal.⁷⁴

B. Test Two: United States v. Ward

The United States Supreme Court was given an opportunity to apply the *Kennedy* test seventeen years after that decision in *United States v. Ward*,⁷⁵ but

⁶⁷ See *id.* at 398-405.

⁶⁸ Schechter, *supra* note 16, at 1157-58.

⁶⁹ 372 U.S. 144 (1963).

⁷⁰ See *id.* at 168-69.

⁷¹ *Id.* at 169. As Justice Resnick noted in her dissent, the *Casalicchio* majority brushed this question aside. *State v. Casalicchio*, 569 N.E.2d 916, 923 (Ohio 1991) (Resnick, J., dissenting).

⁷² *Kennedy*, 372 U.S. at 168.

⁷³ Schechter, *supra* note 16, at 1158 (citing *Kennedy*).

⁷⁴ *Kennedy*, 372 U.S. at 169. The Court did, however, say that it was "convinced" that application of the *Kennedy* criteria to the statute revealed it to be criminal. *Id.*

opted instead to alter the process for making the civil-criminal determination.⁷⁶ The court retained the first step dealing with congressional intent. However, rather than delve into the seven factors set forth in *Kennedy*, the *Ward* Court stated that the second tier of the process was to inquire "further whether the statutory scheme was so punitive either in purpose or effect as to negate [the] intention [that the statute be civil]." ⁷⁷ If indeed the statutory scheme proves to be "so punitive," it will be considered a criminal statute despite the apparent congressional intent that it be civil. The Court stated that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."⁷⁸

It is important to realize the distinction between the *Kennedy* and *Ward* decisions. The *Ward* test is much more deferential to Congress, requiring the "clearest proof" that the statute is "so punitive" as to negate its congressional intent. The *Kennedy* test, on the other hand, weighs seven factors to make the determination.⁷⁹ *Kennedy* uses objective standards to determine the issue without giving an overwhelming amount of deference to Congress. Although the *Ward* decision was handed down after *Kennedy*, it apparently has not displaced the *Kennedy* test, as evidenced by subsequent cases involving one test or the other.⁸⁰ The distinction between the two tests is the starting point for the

⁷⁵ 448 U.S. 242 (1980). Justice Resnick relies on *Ward* in her dissent in *Casalicchio*. *Casalicchio*, 569 N.E.2d at 923-24.

⁷⁶ Schechter, *supra* note 16, at 1158.

⁷⁷ *Ward*, 448 U.S. at 248-49. The Court does mention that the *Kennedy* factor-analysis had been used by the Court of Appeals in the *Ward* case and also that it had been helpful in the past. However, the Court does not rely on the seven points as though they constitute the second tier of a test. Only one point of the seven is mentioned. *See id.* at 248-50.

⁷⁸ *Id.* at 249 (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

⁷⁹ Schechter, *supra* note 16, at 1158-59.

⁸⁰ *Id.* at 1159 n.60 and accompanying text. The footnote states in pertinent part:

[The] . . . lack of preference for either test can be seen in the failure of *Ward* to recognize that the new test might yield different results than the . . . [*Kennedy*] test. The Court indicated that it was merely restating the . . . [*Kennedy*] factors, implying that the *Ward* test is the same as the older test.

Id.

The Supreme Court has recently affirmed this notion. Explaining the Government's misplaced reliance on *Kennedy* and *Ward* in a recent Eighth Amendment case, the Court stated,

The question in [*Kennedy* and *Ward*] was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be

discrepancy between the majority and dissent in *Casalicchio*. Justice Wright, writing for the majority, relied on *Kennedy* while Justice Resnick, in dissent, relied on *Ward*.⁸¹ It is important to realize that both the *Casalicchio* majority and its dissent logically applied the tests upon which they relied. The problem, which *Casalicchio* evidences, is to determine what constitutes a proper test. To make this determination, it is beneficial first to analyze each test in the context of *Casalicchio*.

VI. APPLYING THE TESTS

A. *Kennedy v. Mendoza-Martinez*

Applying the *Kennedy* test, the majority in *Casalicchio* correctly determined that Ohio Revised Code Section 2933.43 entails a criminal forfeiture rather than a civil forfeiture. Although Justice Wright, speaking for the majority, failed to apply the first prong of the *Kennedy* test—determining congressional intent—Justice Resnick's dissenting arguments that a civil statute was intended are compelling.⁸² As Justice Resnick notes, Ohio Revised Code Section 2933.43 provides that:

Where possible, a court holding a forfeiture hearing under this section *shall follow the Rules of Civil Procedure*. When a hearing is conducted under this section, property shall be forfeited upon a showing, *by a preponderance of the*

required. In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in [these cases. Therefore,] we need not address [their] application

Austin v. United States, 113 S. Ct. 2801, 2806 n.6 (1993) (citations omitted). This statement, at its least, displays that there is no definitive test to apply in determining whether a statute is civil or criminal. The fact that *Austin* concerned the application of a constitutional clause (Excessive Fines) to a forfeiture statute, and that *Casalicchio* similarly concerned the application of a constitutional clause (Double Jeopardy) to a forfeiture statute, raises the question of whether the *Casalicchio* court focused, at least in part, on the wrong issue. That is, the *Casalicchio* court focused primarily on whether the Ohio forfeiture statute is civil or criminal when, possibly, it should have been more concerned with whether the statute is remedial or punitive. Although these issues are related, the U.S. Supreme Court's statement above points out that they are, apparently, not fully inclusive.

⁸¹ *State v. Casalicchio*, 569 N.E.2d 916, 920–21, 923–24 (Ohio 1991).

⁸² Although Justice Resnick wrote a dissenting opinion relying on *Ward*, her analysis is appropriate here for the *Kennedy* test (applied by the majority) as the *Ward* test employs the same first step as *Kennedy*. See *supra* notes 75–78 and accompanying text.

evidence, by the petitioner that the person from which the property was seized was in violation of division (A)⁸³

Indeed the statute's reference to the Rules of Civil Procedure and use of a preponderance of the evidence standard indicate an intent to enact a civil provision.⁸⁴ Furthermore, it is possible to argue, as Justice Resnick does, that Ohio Revised Code Section 2933.43(D) implies a remedial, and therefore civil, nature of the statutory scheme in that the legislature is merely trying to recover costs of enforcing, investigating, and prosecuting Ohio's drug laws.⁸⁵ As a result, the first part of the test does not pose much of a problem; it appears that the Ohio legislature did intend the drug forfeiture provision to be a civil statute.

The second prong of the *Kennedy* test requires a balancing of the previously mentioned seven factors to determine if the court should overrule the legislature's intent.⁸⁶ The first question is whether the statute creates an affirmative disability. At least two affirmative disabilities are imposed in forfeiture cases. First, forfeitures entail imposing an inability to claim title to the seized property. Second, forfeitures cause the loss of property rights.⁸⁷ Thus, there is an affirmative disability involved in the forfeiture statute—a factor that indicates the criminal nature of the statute.

The second factor is whether the sanction has historically been considered criminal. This question is troublesome as forfeitures have generally been considered civil actions in Ohio⁸⁸ while at the same time there is much debate about whether *drug* forfeiture laws should be considered criminal. As explained

⁸³ OHIO REV. CODE ANN. § 2933.43(C) (Anderson 1993) (emphasis added).

⁸⁴ *Casalicchio*, 569 N.E.2d at 923.

⁸⁵ *Id.* at 923–24. This point is debatable. Simply because there is a spin-off benefit of increased revenue does not *necessarily* imply that raising capital to fight the war on drugs is the statute's aim. Given the defendant's loss of property, it is every bit as reasonable to assume a punitive effect was the true intention of the legislature, however so disguised.

⁸⁶ See *supra* notes 72–73 and accompanying text. The majority did not explain its analysis of this process in the point by point manner set forth *infra*. Rather, the majority simply pointed to two criminally natured aspects of the statute—the statute's protection for innocent lien holders and its requirement of a felony conviction prior to forfeiture—to determine that the *Kennedy* rationale mandates overriding the legislature's apparent intent to create a civil statute. As a result, it is helpful to apply the criteria point by point. *Casalicchio*, 569 N.E.2d at 921.

⁸⁷ See Schecter, *supra* note 16, at 1161. The author points out that an affirmative disability could be “the mere prohibition of a specific legal act” or “the imposition of an economic, social, or physical harm” and further that the cases cited in *Kennedy* involved a specific legal act. *Id.* at 1161, 1161 n.71.

⁸⁸ *Casalicchio*, 569 N.E.2d at 920.

previously, however, legal views change over time and, as a result, this factor appears to warrant little consideration.

The third inquiry is whether the statute comes into play on a finding of scienter. Ohio Revised Code Section 2933.43(C) provides circumstances that allow one to avoid forfeiture upon a proper showing of lack of knowledge that the property was involved in a crime or an administrative violation.⁸⁹ Consequently, although scienter is not required for the execution of the statute, a lack of knowledge can exempt an innocent defendant from forfeiture. This, in turn, points to the criminal nature of the statute.

The fourth point asks whether the law promotes retribution or deterrence. It is difficult to argue that forcing a defendant to forfeit valuable property does not promote these objectives. Clearly the threat of losing a home, boat, car, or other item of value will have a deterrent effect and promote retribution. As such, the criminal nature of the statute is readily seen in light of the fourth factor.

The fifth factor asks whether the behavior to which the statute applies is already a crime. If so, the criminal nature is further exemplified. This, too, is apparent in the Ohio statute as it requires a felony conviction before there can be a forfeiture action for a defendant's property.⁹⁰ The majority in *Casalicchio* correctly found that the requirement of a felony conviction weighs heavily toward the criminal nature of the statute.⁹¹

The sixth factor is the first and only point that might strongly suggest a civil statutory scheme for the Ohio laws under the *Kennedy* analysis. This factor concerns whether an alternative (remedial) purpose exists for which the statute may reasonably have been intended. As previously noted, it is possible that Ohio's forfeiture provision is designed to recover costs incurred in enforcing the state's drug laws.⁹² Furthermore, one might argue that forfeiture helps strip violators of property used to further drug crimes. Both of these considerations point to a civil nature in the statute.

The seventh factor, however, limits the sixth factor's impact on the determination. The seventh point asks whether the forfeiture appears excessive in relation to the alternative (remedial) purpose assigned. Under the Ohio statute, forfeiture of one's car worth \$7000 might be had for driving with marijuana cigarettes in the car glove compartment. The same offense could also bring forfeiture of a \$700,000 airplane if the marijuana is transported by air rather than by land. The second scenario exemplifies the possibility of excessive forfeitures relative to other violations. That is, the statute appears not

⁸⁹ OHIO REV. CODE ANN. § 2933.43(C) (Anderson 1993).

⁹⁰ *Id.*

⁹¹ *Casalicchio*, 569 N.E.2d at 921.

⁹² *Id.* at 924.

to be excessive in the first instance, but appears in the second instance to be quite excessive, at least in relative terms. As such, the seventh factor can lead to a determination that the statute is criminal in nature.

The *Kennedy* test requires one to weigh these factors to determine whether or not to override congressional intent. As previously stated,⁹³ the test does not give an overwhelming amount of deference to Congress. In this instance, the analysis points away from determining that the Ohio statute has a civil nature as only the sixth factor clearly indicates a civil purpose for the statute. Furthermore, the fourth and fifth factors weigh heavily toward the criminal nature of the statute. On balance, by applying the *Kennedy* test, the *Casalicchio* majority logically determined to override congressional intent to hold that forfeiture pursuant to Ohio's drug forfeiture provision constitutes a criminal sanction.⁹⁴

B. United States v. Ward

Application of the first prong of the *Ward* test is the same as that discussed in the *Kennedy* analysis.⁹⁵ However, the second step in *Ward* is much more deferential to legislative intent than is the second step of *Kennedy*.⁹⁶ The *Ward* test demands the "clearest proof" that the statute is "so punitive" in order to negate Congress' intent. From the outset, this standard presents a steep, uphill climb to rebutting legislative intent.

Although the Ohio drug forfeiture statute promotes retribution, serves a deterrent purpose, requires a conviction of a criminal offense, creates an affirmative disability, and involves other criminally natured aspects,⁹⁷ it does not appear in *Casalicchio*'s case that these points add up to the "clearest proof of a punitive nature" required by *Ward* to negate the civil intent of Ohio's legislature.⁹⁸ Given the possible nonpunitive purposes of the statute, one could

⁹³ See *supra* note 80 and accompanying text.

⁹⁴ Although the *Casalicchio* Court found the Ohio statute to be of a criminal nature, this is not the primary consideration here. Rather, the main point is that if one applies the *Kennedy* test to the Ohio forfeiture provision, finding the statute to be criminal in nature will logically follow.

⁹⁵ See *supra* text accompanying notes 75–78.

⁹⁶ See *supra* text accompanying notes 78–80.

⁹⁷ See *supra* text accompanying notes 86–92.

⁹⁸ But cf. *Austin v. United States*, 113 S. Ct. 2801 (1993). In *Austin*, the Court, while expressly not deciding whether the federal drug forfeiture statute (21 U.S.C. § 881) is civil or criminal, nonetheless determined that it is in fact punitive in nature. *Id.* at 2810–11. An important difference in the cases, however, is that *Austin* did not involve the high standard of "clearest proof," required by *Ward*.

argue that the forfeiture in *Casalicchio*'s case was not overly punitive. *Casalicchio* was in fact concealing in his automobile three different forms of controlled substances as well as a drug inhaling device. Furthermore, it can be argued that the value of *Casalicchio*'s car is not so disproportionate to the crimes committed such that the statute is necessarily criminal as applied. In her dissent, Justice Resnick further points out that even though the statute requires a felony conviction prior to forfeiture and that it protects innocent lien holders and property owners from loss, that in so providing, the legislature sought to avoid due process problems.⁹⁹ These arguments may or may not be individually persuasive. The point to be taken, however, is that given their totality and the deference to be accorded Congress under the test, the "clearest proof" standard that the statute is "so punitive" is simply not met. Thus, by applying the test provided in *Ward*, Justice Resnick correctly determined the statute should be considered civil as applied to *Casalicchio*.¹⁰⁰

It seems clear from the opposite outcomes of the two tests that different results can occur depending on which test is used. It is therefore worthwhile to determine which test, if either, is appropriate and should be applied.

VII. DETERMINING A PROPER TEST

Both the *Ward* and *Kennedy* tests have the same initial step of inquiring into legislative intent. The tests differ in their second steps. The *Ward* test requires a determination based on the individuality of the case. It will only determine the statute to be criminal if, in its application, the "clearest proof" proves it is "so punitive" as to negate congressional intent.¹⁰¹ It therefore must be applied on a case by case analysis, determining the severity of the sanction based on the value of the forfeited property in comparison to the violation of the law.¹⁰² The *Kennedy* test, on the other hand, does not require a case by case analysis to determine if "as applied" the statute is criminal. Rather, it calls for courts to weigh a number of factors to determine whether the statute is criminal despite its civil label.¹⁰³ Thus, *Kennedy* offers a bright-line test to

⁹⁹ *State v. Casalicchio*, 569 N.E.2d 916, 924 (Ohio 1991) (Resnick, J., dissenting).

¹⁰⁰ Again, the main point here is not that Justice Resnick's final determination that the Ohio forfeiture law entails a civil sanction is correct; rather, the primary goal is to illustrate that applying the *Ward* test logically leads to the determination that the Ohio statute is civil in nature.

¹⁰¹ *United States v. Ward*, 448 U.S. 242, 249 (1980).

¹⁰² *Schechter*, *supra* note 16, at 1163.

¹⁰³ *Id.*

determine the nature of the statute for every case that is to fall under the statute.¹⁰⁴

The reality, however, is that legal issues are not always formfitting to bright-line tests. Although such tests help shape neat legal symmetry, they can often lead to unjust consequences. The legislature's desire to fight our country's drug problem is compelling. Forfeiture laws help lead the battle against drugs in America. There may be times when, as applied, the overriding result of Ohio's drug forfeiture statute will be criminal in nature. This being true, however, it does not follow that Ohio's civilly intended drug forfeiture statute should therefore always be considered to entail a criminal sanction.¹⁰⁵

Although the *Kennedy* bright-line test is inappropriate, the *Ward* test itself should be altered if it is to be effective. Specifically, courts should give less deference to the legislature in determining whether to override legislative intent to enact a civil statute. The "clearest proof" that a statute is "so punitive" is simply too high a level of deference, particularly when constitutional rights hang in the balance. A number of commentators agree, one stating that:

Courts have previously tried to ascertain the intent of Congress, considering Congressional intent to be the principal criterion for determining whether a particular penalty is civil or criminal. But this deference to Congress is a bit strange . . . [as] "whether a particular penalty is civil or criminal in nature seems a question of legal philosophy that the Supreme Court is best equipped to address" [I]t is odd, therefore, that the court would defer so heavily to Congress's classification of forfeiture as civil rather than criminal.¹⁰⁶

This statement is persuasive. Legislatures and prosecutors should not be able to side step a defendant's constitutional rights by the mere labeling of a statute as civil.

¹⁰⁴ *Id.*

¹⁰⁵ Surely it is a legitimate notion to argue that the Ohio legislature desires to rid the State of items such as super-powered boats capable of maneuvering through six inches of water and vehicles designed with floorboards and the like that aid in trafficking illegal drugs. Although these may be extreme examples, is it not a legitimate process for Congress to enact a civil statute so as to conduct in rem proceedings against such property? If it is legitimate, as I argue, the problem then is to address how to stop the application of such statutes from becoming criminal in nature as applied. *But see* *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993). *Austin* stated, without elaboration, that real estate and an automobile involved in drug dealings do not qualify as "instruments" of the drug trade. *Id.* It appears difficult to make the same argument in the examples set forth above.

¹⁰⁶ Christine Meyer, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 871-72 (1991).

The problem that arises is that although the Ohio drug forfeiture statute does have remedial, nonpunitive aspirations, as the statute is applied, its overriding result has the potential to be punitive in nature. As such, too much deference to legislative intent can serve to strip a defendant of many of his constitutional and other rights.

VIII. CONCLUSION

Determining whether a drug forfeiture statute is civil or criminal should depend on the facts of each case. In this regard, congressional intent should serve simply as a starting point in the process. When a forfeiture statute is applied such that the overriding result is punitive in nature, a defendant's constitutional rights should not be sacrificed by the mere gloss of a civil label. This is true even though the legislature may have intended the statute to be applied in a different manner.

Sean G. Alexander